

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

IN RE: AUTOMOTIVE PARTS ANTITRUST LITIGATION	:	Master File No. 12-md-02311
	:	Honorable Marianne O. Battani
IN RE: ALL AUTO PARTS CASES	:	
	:	
THIS DOCUMENT RELATES TO: ALL ACTIONS	:	
	:	

**THE PARTIES' MOTION TO FILE THE PARTIES' JOINT REPLY TO CERTAIN
NON-PARTIES' OPPOSITIONS TO THE PARTIES' RENEWED MOTION TO
COMPEL DISCOVERY UNDER SEAL PURSUANT TO E.D. MICH. LR 5.3**

The Parties¹, by their undersigned counsel, submit the following for their Motion to file The Parties' Joint Reply to Certain Non-Parties' Oppositions to the Parties' Renewed Motion to Compel Discovery, together with all exhibits, Under Seal Pursuant to E.D. Mich. LR 5.3:

1. Documents that reveal "truly confidential information" constitute a recognized exception to the general right of public access to judicial records and are properly filed under seal. *See, e.g., LL NJ, Inc. v. NBC-Subsidiary (WCAU-TV), L.P.*, 2008 WL 1923261, at *27 (E.D. Mich. 2008).

2. Here, certain non-party original equipment manufacturers and their affiliated entities ("OEMs") have each designated certain information as highly confidential. While the Parties take no position as to whether the information is truly confidential, a protective order

¹ The "Parties" joining in this motion include: End-Payor Plaintiff, Truck and Equipment Dealer Plaintiffs, the State of Florida, the State of Indiana, and certain Defendants in *Automotive Parts Antitrust Litigation*, No. 2:12- md-02311-MOB-MKM (E.D. Mich.). Not all Defendants join this motion with respect to all OEMs. *See* ECF No. 1185 at Attachment A.

requires information designated as confidential to be filed under seal and, therefore, the Parties seek to file the Joint Reply and exhibits which cite and incorporate this information under seal until such time as the Court determines whether or not the information is truly confidential.

3. E.D. Mich. LR 5.3(b)(2) states that a motion or proposed stipulated order seeking such authorization must include the following: (1) the authority for sealing; (2) an identification and description of each item proposed for sealing; (3) the reason that sealing each item is necessary; (4) the reason that a means other than sealing is unavailable or unsatisfactory to preserve the interest advanced by the movant in support of the seal; and (5) a memorandum of legal authority supporting the seal. E.D. Mich. LR 5.3(b)(2)(A).

4. As to the first prong, the Stipulation and Protective Order Governing the Production and Exchange of Confidential Information (“protective order”), dated July 10, 2012, provides authority for the sealing of the proposed pleading under E.D. Mich. LR 5.3. Paragraph 7 of the protective order, entitled “Filing of Protected Information,” states that “[a]ll documents, materials, or other information containing Confidential Information or Highly Confidential Information that are filed with the Court shall be filed under seal...” and consistent with Local Rule 5.3. *See* 2:12-md-02311, ECF No. 200. The Court maintains “supervisory power over its own records and files.” *Sami v. Detroit Med Ctr.*, 2012 WL 3945532 at 1 (E.D. Mich. Sept. 10, 2012) citing to *Nixon v. Warner Commc’ns Inc.*, 435 U.S. 589, 598 (1978). This authority includes fashioning orders that limit access to certain court documents. *Sami, supra* citing to Fed.R.Civ.P. 26(c). The OEMs claim that the testimony and information they have provided should be designated as highly confidential and/or highly confidential – outside attorneys’ eyes only, and this constitutes authority to seal the brief. If the OEMs’ designations are to be taken at face value, the information overcomes the presumption that documents should be filed in public

because the interests of protecting the OEMs' confidential information outweighs the public's right to know. If the information is highly confidential, as the OEMs claim, the case law above demonstrates that it falls within one of the recognized exceptions to the general right of public access to judicial records and, therefore, constitutes authority for filing under seal.

5. As to the second prong, in support of their motion to compel discovery, the Parties seek to file the following exhibits s under seal: Exhibit A - Reply Declaration of Sheldon H. Klein in Support of the Parties' Renewed Motion to Compel Discovery from Non-Party Original Equipment Manufacturers, and in Particular FCA US, LLC; Exhibit B - Supplemental Declaration of Sheldon H. Klein in Support of the Parties' Reply to Non-Party Original Equipment Manufacturer General Motors' Opposition to the Parties' Renewed Motion to Compel Discovery; Exhibit C - Declaration of Lara E. Veblen Trager in Support of the Parties' Joint Reply to Certain Non-Parties' Oppositions to the Parties' Renewed Motion to Compel Discovery, and in particular American Honda Motor Company, Inc., Honda North America, Inc., Honda of America Manufacturing, Inc., Honda Precision Parts of Georgia, LLC, Honda Manufacturing of Indiana, LLC, Honda of South Carolina Manufacturing, Inc., Honda R&D Americas, Inc., Honda Research Institute USA, Inc., and Honda Transmission Manufacturing of America, Inc. ("Honda"); Exhibit D - Declaration of Abram J. Ellis in Support of the Parties' Joint Reply to Certain Nonparties' Oppositions to the Parties' Renewed Motion to Compel Discovery from the Non-Party Original Equipment Manufacturers, and in Particular Nissan North America; Exhibit E - Declaration of Angela A. Smedley in Support of the Parties' Joint Reply to Certain Non-Parties' Oppositions to the Parties' Renewed Motion to Compel Discovery, and Particularly Subaru of Indiana Automotive, Inc.; Exhibit F - Declaration of Adam C. Hemlock in Support of the Parties' Joint Reply to Certain Non-Parties' Oppositions to the

Parties' Renewed Motion to Compel Discovery; and Exhibit G – Declaration of Steven N. Williams in support of the Parties' Joint Reply to Certain Non-Parties' Oppositions to the Parties' Renewed Motion to Compel Discovery. The declarations contain the OEMs' data and information that the OEMs claim is confidential and, therefore, only the OEMs are in a position to justify the highly confidential designations. For purposes of this motion, the Parties have taken OEMs' claims of confidentiality at face value.

6. As to the third prong, assuming that OEMs' highly confidential designations are accurate, it is necessary to seal the declarations because they presumably contain highly confidential information and the Parties are required, pursuant to a protective order, to file such information under seal. Otherwise, the information will be available to the public in contravention of the protective order and the OEMs' interest in protecting truly confidential information.

7. As to the fourth prong, there is no less onerous alternative to sealing these declarations that would ensure the confidentiality of the OEMs' information. The Parties have a strong interest in utilizing the "highly confidential" or "highly confidential – outside attorneys' eyes only" information in connection with their motion to compel discovery. The only way to do so, without a ruling from the Court that the information is not confidential, is to file the Reply, exhibits, and declarations under seal. Should the Court determine the information is not confidential, the Parties will re-file the declarations not under seal.

8. As to the fifth and final prong, a memorandum of legal support is attached.

9. In support of this motion, the Parties rely upon the accompanying memorandum of law which is incorporated by reference herein.

WHEREFORE, the Parties respectfully move the Court, pursuant to E.D. Mich. LR 5.3, for an Order allowing the Parties to file the Joint Reply under seal, including:

- Exhibit A - Reply Declaration of Sheldon H. Klein in Support of the Parties' Renewed Motion to Compel Discovery from Non-Party Original Equipment Manufacturers, and in Particular FCA US, LLC;
- Exhibit B - Supplemental Declaration of Sheldon H. Klein in Support of the Parties' Reply to Non-Party Original Equipment Manufacturer General Motors' Opposition to the Parties' Renewed Motion to Compel Discovery;
- Exhibit C - Declaration of Lara E. Veblen Trager in Support of the Parties' Joint Reply to Certain Non-Parties' Oppositions to the Parties' Renewed Motion to Compel Discovery, and in particular American Honda Motor Company, Inc., Honda North America, Inc., Honda of America Manufacturing, Inc., Honda Precision Parts of Georgia, LLC, Honda Manufacturing of Indiana, LLC, Honda of South Carolina Manufacturing, Inc., Honda R&D Americas, Inc., Honda Research Institute USA, Inc., and Honda Transmission Manufacturing of America, Inc. ("Honda");
- Exhibit D - Declaration of Abram J. Ellis in Support of the Parties' Joint Reply to Certain Nonparties' Oppositions to the Parties' Renewed Motion to Compel Discovery from the Non-Party Original Equipment Manufacturers, and in Particular Nissan North America;
- Exhibit E - Declaration of Angela A. Smedley in Support of the Parties' Joint Reply to Certain Non-Parties' Oppositions to the Parties' Renewed

Motion to Compel Discovery, and Particularly Subaru of Indiana Automotive, Inc.;

- Exhibit F - Declaration of Adam C. Hemlock in Support of the Parties' Joint Reply to Certain Non-Parties' Oppositions to the Parties' Renewed Motion to Compel Discovery; and
- Exhibit G – Declaration of Steven N. Williams in support of the Parties' Joint Reply to Certain Non-Parties' Oppositions to the Parties' Renewed Motion to Compel Discovery

Dated: December 2, 2016

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[Additional signatures following Memorandum of Law]

**UNITED STATES DISTRICT COURT
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THIS DOCUMENT RELATES TO: ALL ACTIONS	:	
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**THE PARTIES' MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO FILE THE PARTIES' JOINT REPLY TO CERTAIN NON-PARTIES'
OPPOSITIONS TO THE PARTIES' RENEWED MOTION TO COMPEL DISCOVERY
UNDER SEAL PURSUANT TO E.D. MICH. LR 5.3**

I. INTRODUCTION AND BACKGROUND

The Parties seek to file The Parties' Joint Reply to Certain Non-Parties' Oppositions to the Parties' Renewed Motion to Compel Discovery (the "Joint Reply"), in support of their motion to compel discovery, under seal because they contain information which certain non-party OEMs (the "OEMs") have designated as highly confidential or highly confidential – outside attorneys' eyes only. The Parties take no position as to whether such information is actually confidential and should be precluded from public view. However, because a protective order requires the Parties to file documents designated as highly confidential under seal, the Parties are bringing this motion requesting an Order permitting the Parties to file the Reply under

seal. Should the Court determine at a later date that the information should not be sealed, the Parties will re-file the Declarations without sealing.

II. LAW AND ARGUMENT

Although judicial records are presumptively open to the public, this presumption may be overcome where “interests of privacy outweigh the public's right to know.” *In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 474 (6th Cir. 1983). Thus, sealing judicial records may be justified “by a particularized special need for confidentiality, such as when trade secrets, national security, or certain privacy rights of trial participants or third parties are implicated.” *Encana Oil & Gas (USA), Inc. v. Zaremba Fam. Farms, Inc.*, No. 1:12-CV-369, 2012 WL 1377598, at *1 (W.D. Mich. Apr. 19, 2012) (citing *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983)), quoted in *Cinpres Gas Injection Ltd. v. Volkswagen Group of Am., Inc.*, No. 12-CV-13000, 2013 WL 11319319, at *1 (E.D. Mich. Feb. 14, 2013). See, e.g., *U.S. v. Nallani*, 11-CR-20365, 2016 WL 4138227, at *3 (E.D. Mich. Aug. 3, 2016) (considering, in balancing the competing interests of access and privacy, whether the matter involves public parties or issues of legitimate public concern; the nature and degree of injury that will occur if the information is made public; the sensitivity of the information and the subject; the reliability of the information; and whether there will be an opportunity to respond to the information); see also *Gookin v. Altus Capital Partners, Inc.*, CIV.A. 05-179-JBC, 2006 WL 782456, at *2 (E.D. Ky. Mar. 23, 2006); accord *Romero v. Drummond Co.*, 480 F.3d 1234, 1246 (11th Cir. 2005).

The Local Rules of the United States District Court for the Eastern District of Michigan, and the case law thereunder, set forth the process for filing documents under seal. E.D. Mich. LR 5.3(b) provides that a court order is required to seal documents where, as here, no particular

statute or rule authorizes such sealing. E.D. Mich. LR 5.3(b)(1). E.D. Mich. LR 5.3(b)(2) states that a motion or proposed stipulated order seeking such authorization must include the following: (1) the authority for sealing; (2) an identification and description of each item proposed for sealing; (3) the reason that sealing each item is necessary; (4) the reason that a means other than sealing is unavailable or unsatisfactory to preserve the interest advanced by the movant in support of the seal; and (5) a memorandum of legal authority supporting the seal. E.D. Mich. LR 5.3(b)(2)(A).

The Parties have identified the Stipulation and Protective Order Governing the Production and Exchange of Confidential Information (“protective order”), dated July 10, 2012, as authority for this Court to enter an Order allowing the Parties to file the OEM Declarations under seal, pursuant to E.D. Mich. LR 5.3. Paragraph 7 of the protective order, entitled “Filing of Protected Information,” states that “[a]ll documents, materials, or other information containing Confidential Information or Highly Confidential Information that are filed with the Court shall be filed under seal...” and consistent with Local Rule 5.3. See 2:12-md-2311, ECF No. 200. The Court maintains “supervisory power over its own records and files.” *Sami v. Detroit Med Ctr.*, 2012 WL 3945532 at 1 (E.D. Mich. Sept. 10, 2012) citing to *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978). This authority includes fashioning orders that limit access to certain court documents. *Sami*, *supra* citing to Fed.R.Civ.P. 26(c).

Here, the OEMs have designated information that the Parties seek to utilize as “highly confidential” or “highly confidential – outside attorneys’ eyes only.” Documents that reveal trade secret business information, information that might harm a litigant’s competitive standing, or other “truly confidential information” are all recognized exceptions to the general right of public access to judicial records and are properly filed under seal. See, e.g., *LL NJ, Inc. v. NBC-*

Subsidiary (WCAU-TV), L.P., 2008 WL 1923261, at *27 (E.D. Mich. 2008); *Encana Oil & Gas (USA), Inc. v. Zaremba Family Farms, Inc.*, 2012 WL 1377598, at *2 (W.D. Mich. 2012); *Wedgewood Ltd. Partnership I v. Township of Liberty*, 2007 WL 1796089, at *3 (S.D. Ohio 2007). Further, commercially sensitive information, whose dissemination has the ability to harm a producing party's business standing has been held by other courts to be properly sealable. *Mars, Inc. v. JCM Am. Corp.*, 2007 WL 496816, at *2 (D.N.J. Feb. 13, 2007) ("Courts generally protect materials containing 'trade secret[s] or other confidential research, development, or commercial information' to prevent harm to a litigant's standing in the marketplace"); *Network Appliance Inc. v. Sun Microsystems Inc.*, No., 07-CV-06053-EDL, 2010 WL 841274, at *2-5 (N.D. Cal. Mar. 10, 2010).

The Parties take no position as to whether the information is truly confidential, but if the OEMs' designations are to be taken at face value, the information overcomes the presumption that documents should be filed in public because the interests of protecting the testimony from the amnesty applicants outweigh the public's right to know. If the information is highly confidential, as the OEMs claim, the case law above demonstrates that it falls within one of the recognized exceptions to the general right of public access to judicial records, and therefore constitutes authority for filing under seal.

The Parties' Reply includes all of the criteria required under E.D. Mich. LR 5.3(b) and the motion at issue is not a dispositive motion, a motion for class certification, or a motion to dismiss or a complaint. This further militates against disclosure. No member of the public needs this information. Accordingly, the Parties should be permitted to file the Reply under seal.

III. CONCLUSION

For the foregoing reasons, this Court should grant the Parties' motion and permit the Parties to file, under seal, their Reply, pursuant to E.D. Mich. LR 5.3.

Dated: December 2, 2016

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